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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. NORMAN GARRETT, Defendant and Appellant.	B213729 (Los Angeles County Super. Ct. No. BA337877)

APPEAL from a judgment of the Superior Court of Los Angeles County. John S. Fisher, Judge. Affirmed.

Patrick Morgan Ford, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Kenneth C. Byrne and Eric J. Kohm, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Appellant, Norman Garrett, was convicted of burglary -- his third strike -- after representing himself in a jury trial. He contends that the trial court erred in not inquiring into his mental competency to waive his right to counsel before granting his request to represent himself. We conclude that appellant has failed to show substantial evidence of mental illness to compel the trial court to order a hearing, and we affirm the judgment.

STATEMENT OF THE CASE

In a one-count information, appellant was charged with first degree residential burglary, a violation of Penal Code section 459.[1] For purposes of the three strikes law, sections 1170.12, subdivision (a) through (d), and section 667, subdivisions (b) through (i), as well as section 667, subdivision (a)(1), it was alleged that appellant had suffered two prior convictions: a 1996 robbery pursuant to section 211 and a 2001 first degree burglary under section 459. It was further alleged pursuant to section 667.5, subdivision (b), that appellant had suffered four prior convictions for which he did not remain free of prison custody for a period of five years after his release. Finally, it was alleged that appellant had been convicted of four felonies within the meaning of section 1203, subdivision (e)(4). Appellant entered a not guilty plea and denied all the special allegations.

On July 18, 2008, appellant orally moved to represent himself, and the court granted the motion. Appellant later executed a "*Faretta* Waiver" which was filed on August 5, 2008.[2]

Following a jury trial, appellant was convicted, and the jury found that appellant had been previously convicted of the strikes alleged — robbery and first degree

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[1] Unless otherwise indicated, all further statutory references are to the Penal Code.

[2] See *Faretta v. California* (1975) 422 U.S. 806, 835 (*Faretta*), and discussion, *post*.

burglary.[3] Thereafter, the court sentenced appellant to 35 years to life in state prison, along with a $1,000 restitution fine and a $20 court security assessment.

Appellant filed a notice of appeal on a timely basis.

STATEMENT OF THE FACTS

A. The Crime and Appellant's Defense

Shortly before 10 a.m. on March 16, 2008, Donna Guay, a University of Southern California (USC) student and a resident at the Kappa Kappa Gamma sorority house, saw a man whom she did not recognize near the Kappa Sigma house, which was directly across the street. Ms. Guay saw the man go towards an entrance to the Kappa Sigma house. She called security because she "just felt uneasy about the gentleman . . . looking around" and because the man was walking quickly and held something in his hand that resembled a tool to open a door. USC patrol officer Angel Sandin responded, talked with Ms. Guay, and then went across the street and saw appellant come out of the west side door of the Kappa Sigma house. He was holding a brown "Trader Joe's kind of paper bag" in his hand. Sandin knew he was not a student, drew his weapon, and told appellant to put his hands up. Appellant dropped the bag, and while he started to put up his hands, he then ran away. Officer Sandin called for additional units. A chase ensued during which Sandin lost appellant but found him later on 30th Street and University Avenue. At that point appellant was sweating and walking at a fast pace. Other officers approached appellant from different directions. Sandin recognized appellant because he "had arrested him for the same thing years ago."

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[3] Neither appellant nor respondent mention the disposition of two of the prior felony convictions alleged pursuant to section 667.5, subdivision (b) and section 1203, subdivision (e)(4), and we have found no mention of them in the minutes. At the preliminary hearing, the prosecutor asked to amend the information by interlineation to strike the prior conviction of section 496 and proceed on the one count with an allegation of two prior convictions. However, the information was not amended by interlineation or otherwise.

Minutes later, once appellant was in custody, Officer Sandin returned to the fraternity house and retrieved the paper bag that appellant had dropped. Inside was a white Apple laptop computer. Sandin located a room in the house with an unlocked door and, inside, he found an unattached connection to a computer. Sandin called the Los Angeles Police Department who responded to the scene and took custody of appellant and the computer. Officer Lormans went into the house and also saw the unlocked room and unattached computer cable. He contacted Gregory Turk, who identified the computer as his own. Turk had not given appellant (whom he did not know) permission to take it.

Appellant testified on his own behalf He denied stealing the computer and said he had no need to do so because he had his own money and a friend who took good care of him. He said he had a drug problem and frequented the USC area because "there are good drugs in that area and the Exposition Park area." He was there on the day in question to buy drugs. He bought heroin and was in an alley getting ready to "shoot up the drugs" when two USC sport utility vehicles came "flying down the alley. And as they flew down the alley I got nervous because I had drugs on me and I didn't want to get caught for it." Appellant put his drugs and paraphernalia in his pocket, ran, jumped over a fence, and sprained his ankle. He found a hidden corridor where he was able to inject his drugs. Next, he got rid of the paraphernalia and inserted the rest of his drugs in his rectum.

Then, as appellant was "walking down the street trying to proceed home high as a kite…," Officer Sandin and some others "drew up on me and with a gun and everything and told me to get down." Sandin jumped out of his car and said, "Didn't you know I would catch you?" and "Don't I remember you from a previous arrest?" Appellant replied that he did, and called him an "uncomfortably built fat pig." Appellant cursed at him and said, "You're ruining my high because you're detaining me, what is the problem? I have nothing on me." Appellant testified that he did not like Officer Sandin and Officer Sandin did like him "because we have a history. . . . Officer Sandin is basically lying on me."

Appellant testified that he had served significant time in prison for his prior burglary and because of that "I will never commit another residential burglary." Appellant denied that the laptop was his.

B. Appellant's Competence

After appellant was arrested, Department 95 of the Superior Court conducted a hearing to determine whether he was competent to stand trial.[4] Dr. Sharma, the psychiatrist appointed to evaluate appellant, found that he was malingering.[5] Appellant was found competent to stand trial and his preliminary hearing began on the morning of June 2, 2008, before Judge Hank M. Goldberg. Judge Goldberg stated for the record that as soon as appellant was brought into the court, he "started banging his head against counsel table" and "yelling out." The bailiff pulled him to the ground, and the court tried several times to get him to behave, but appellant kept speaking over the judge, kept banging his head, and ultimately had to be escorted out.

Defense counsel informed the court that appellant had been found competent to stand trial and that Dr. Sharma was of the opinion that appellant was malingering. Judge Goldberg agreed that appellant's behavior in his court was "consistent with someone who doesn't want to have a preliminary hearing. Not necessarily someone who is – insane." After the noon recess, the court asked the bailiff to see if appellant would calm down enough to return to court. The bailiff said that "He's calm when he's not in the courtroom. When he comes into the courtroom, for some reason, he -- turns into --." In

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[4] A defendant is mentally incompetent to stand trial "if, as a result of mental disorder or developmental disability, the defendant is unable to understand the nature of the criminal proceedings or to assist counsel in the conduct of a defense in a rational manner." (§ 1367, subd. (a).)

[5] Appellant has moved to augment the record with Dr. Sharma's report. Upon further review of the record, we have determined that the report was not before Judge Goldberg at the time of the preliminary hearing, although it was filed in the Superior Court the same day. However, because the court and counsel discussed Dr. Sharma's conclusion at the preliminary hearing, we take judicial notice of that part of the report.

short, appellant did not agree to return to the courtroom, and he talked about bombings and terrorists. Defense counsel stipulated that appellant had voluntarily absented himself, and the preliminary hearing went forward without him. Appellant was bound over for trial on the residential burglary charge.

Appellant was represented by counsel when he was arraigned on the information on June 16, 2008.

Before appellant was granted pro per status on July 18, 2008, counsel made the court aware of Dr. Sharma's psychiatric report, and defense counsel agreed that his conclusion was "pretty clear-cut."The People also informed the court of what had occurred at the preliminary hearing.

Before the trial began, the People offered to resolve the case for a fixed sentence of eight years with credits The trial judge discussed the People's offer with the appellant and told him that "if you were involved in some way in this case where you could go down it's crazy not to take this deal. I mean, it is. So you think about it. Appellant answered that "I wish that I could explain what happened and then they will see that – see there's two sides to the story, Your Honor." Appellant gave the offer serious consideration, but said he preferred to tell his version of the story to the jury.

DISCUSSION

1. Appellant's Contention

Appellant's sole contention on appeal is that "the trial court erred by allowing appellant to represent himself at trial without conducting a hearing to determine whether and to what extent he was mentally ill."

2. Competentcy and the Right of Self-Representation

While a defendant in a criminal proceeding has a federal constitutional right to waive counsel and represent himself, a knowing and intelligent waiver is required before pro per status is allowed. (*Faretta*, *supra*, 422 U.S. at p.835.) "The requirements for a valid waiver of the right to counsel are (1) a determination that the accused is competent to waive the right, i.e., he or she has the mental capacity to understand the nature and

object of the proceedings against him or her; and (2) a finding that the waiver is knowing and voluntary, i.e., the accused understands the significance and consequences of the decision and makes it without coercion. [Citations.]" (*People v. Koontz* (2002) 27 Cal.4th 1041, 1069-1070; see also, *Godinez v. Moran* (1993) 509 U.S. 389, 400-401 & fn. 12 (*Godinez*),)

A defendant must be competent to waive his constitutional right to counsel. (*Godinez*, *supra*, 509 U.S. at pp. 399-400, citing *Faretta*, *supra*, 422 U.S. at p. 835.) This does not mean that "a court is required to make a competency determination in every case in which a defendant seeks . . . to waive his right to counsel. As in any criminal case, a competency determination is necessary only when a court has reason to doubt the defendant's competence. [Citations.]" (*Godinez*, *supra*, 509 U.S. at p. 401.)

We review the entire record on appeal, including proceedings after appellant received the right to represent himself and determine de novo whether appellant's waiver of the right to counsel was knowing and voluntary. (*People v Marshall* (1997) 15 Cal.4th 1, 24; *People v. Koontz*, *supra*, 27 Cal.4th at p. 1070.)

3. Appellant's Competence to Waive the Right to Counsel

Appellant contends that the trial court erred in relying on *Indiana v. Edwards* (2008) 554 U.S. __ [128 S.Ct. 2379] (*Edwards*), by failing to acknowledge the holding of that case. The *Edwards* court held only that states *may*, without running afoul of *Faretta*, impose a higher standard of mental competence for self-representation than for trial with counsel. *Edwards* does not mandate the application of such a dual standard of competency for mentally ill defendants. Thus the Constitution does not forbid a state from denying a defendant who suffers from severe mental illness the right to represent himself. (*Id.*, at p. ___ [128 S.Ct. at pp. 2381, 2387-2388].)

Although it was a capital case, the recent California Supreme Court decision in *People v. Taylor* (2009) 47 Cal.4th 850 (*Taylor*) deserves mention, because our Supreme Court said of *Edwards*:

"'In light of *Edwards*, it is clear . . . that we are free to adopt for mentally ill or mentally incapacitated defendants who wish to represent themselves at trial a competency standard that differs from the standard for determining whether such a defendant is competent to stand trial. It is equally clear, however, that *Edwards* does not *mandate* the application of such a dual standard of competency for mentally ill defendants. In other words, *Edwards* did not alter the principle that the federal constitution is not violated when a trial court permits a mentally ill defendant to represent himself at trial, even if he lacks the mental capacity to conduct the trial proceedings himself, if he is competent to stand trial and his waiver of counsel is voluntary, knowing and intelligent.' [Citation.] *Edwards* thus does not support a claim of federal constitutional error in a case like the present one, in which defendant's request to represent himself was granted." (*Taylor, supra*, 47 Cal.4th at pp. 875-876.) As there is nothing in the *Edwards* holding that compels courts to order a competency hearing whenever there is *some* indication that a defendant might be mentally ill, we cannot find that the trial court was required to acknowledge *Edwards'* holding any more than it did.

Edwards did not abrogate the law in California to the effect that a trial court is not required to order a competency hearing without substantial evidence that defendant is incompetent to waive counsel. (*People v. Blair* (2005) 36 Cal.4th 686, 714-715 & fn.11, citing *Godinez supra*, 509 U.S. at pp. 399-400.) On appeal, a defendant who challenges an order granting self-representation must demonstrate that there was substantial evidence of incompetence to waive counsel. (See *People v. Welch* (1999) 20 Cal.4th 701, 742.)

Appellant has pointed to just two indications of his incompetence to waive his constitutional right to counsel: (1) one of the grounds stated in appellant's motion for advisory counsel, filed in September 2008, was that "[b]ecause defendant is under psychiatric care at the present, advisory counsel will be able to represent the defendant in the event that termination of . . . self-representation is necessary"; and (2) the trial court's comment to appellant in November 2008, that "if you were involved in some way in this

case where you could go down it's crazy not to take this deal. I mean, it is. So you think about it." We do not believe these facts demonstrate appellant was incompetent.

A condition requiring psychiatric care is insufficient, without more, to provide substantial evidence of a mental illness that would make a defendant incompetent to waive the right to be represented by counsel. (See *People v. Blair*, *supra*, 36 Cal.4th at p. 714.) Further, it requires no dictionary to know the word "crazy" means not only "insane" in American English, but also "extremely foolish." The trial court's comment on appellant's foolishness is not substantial evidence of mental illness; nor does it indicate that the court should have entertained a doubt about appellant's competence to represent himself. (See *id*., at pp. 714-715 [comment of judge in previous trial that defendant was a "psychopath" did not indicate that he should have entertained a doubt about the defendant's competence].)

We understand that "the competence that is required of a defendant seeking to waive his right to counsel is the competence to *waive the right*, not the competence to represent himself. [Citation.]" (*Godinez*, *supra*, 509 U.S. at p. 399, fn.omitted.) Our own review of the record reveals no substantial evidence that would raise a doubt as to appellant's competence to waive his right to counsel. There was no indication of delusional thinking, no psychotic (or other) outbursts, and no other evidence of mental illness. Appellant's behavior had improved by July 18, 2008, when he asked to represent himself. He was not disruptive at all. The record reflects that the judge made an appropriate inquiry, and appellant clearly answered the questions. Appellant acknowledged some of the disadvantages of self representation. Appellant initialed the "*Faretta* Waiver" in every place where initials were required. He clearly provided his birth date, educational information, employment experience. Appellant gave the eight-year offer serious consideration, but he preferred to tell his version the story to the jury.[6]

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[6] Again, *Taylor* is instructive, for our Supreme Court found an intelligent waiver of counsel after a somewhat similar colloquy. There, as here, when the court questioned the appellant, he "did not simply reply to the court passively or monosyllabically." (*Taylor*, *supra*, 47 Cal.4th at p 876.) There, the appellant said, "I understand clearly" when the

From that point on, nothing appellant did gave the court any cause to doubt his competency. He filed a request for discovery. He filed motions to continue the trial and for pro per funds, and the court granted them. He filed an unsuccessful motion for a physical lineup. He filed a motion for advisory counsel and obtained stand-by counsel. At trial, appellant's opening statement was to the point and free from objections. Appellant's cross examination, while perhaps amateur at places, was focused. He knew when to stop questioning a witness and when not to question a witness. He participated in selecting jury instructions and successfully and properly argued for a particular instruction. When he testified, he gave a cogent narrative, and he withstood cross-examination without any outbursts. His closing argument was lucid, and free from any tantrums or odd behavior. Finally, the jury asked twice for readbacks of the testimony from two witnesses, an indication that appellant's performance at the trial did not reflect incompetence.

We conclude that the record does not contain substantial evidence that appellant was incompetent to waive counsel and represent himself, and thus the trial court did not err.

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court elaborated on the disadvantages of self-representation. (*Ibid*.) "The record clearly shows defendant chose self-representation with his eyes open to the risks and disadvantages it entailed, the nature and seriousness of the charges he faced, and his right to continue being represented by appointed counsel throughout trial." (*Ibid*.) In *Taylor*, unlike the present case, a psychologist found the appellant "to have low intelligence and difficulty with abstract thinking; as a consequence, he would experience 'some difficulty in representing himself without an attorney.' Nothing in [the psychologist's] report, however, should have convinced [the trial judge] that, contrary to his own impressions during his lengthy colloquy with defendant, defendant did not understand the contours of his choice to represent himself." (*Id*. at p. 877.)

DISPOSITION

The judgment is affirmed.

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MOHR, J.[*]

We concur:

FLIER, Acting P. J.

BIGELOW, J.

[*] Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.